



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

PETITION NO.16 OF 2018

MAKAL LOLUKA SOLOMON.....1ST PETITIONER

PURITY J TALLAM.....2ND PETITIONER

MACCAH HAMISI.....3RD PETITIONER

REV ELIHAIJ BOIYWO.....4th PETITIONER

VERSUS

THE SPEAKER COUNTY ASSEMBLY OF BARINGO.....1ST RESPONDENT

THE COUNTY ASSEMBLY OF BARINGO.....2ND RESPONDENT

RULING

The respondents have filed Notice of Preliminary Objections to the suit and Application in *liminen* on the grounds that;

- 1. The court lacks jurisdiction and want of forum*
- 2. The applicants' application and suit offends mandatory provisions of the statutes more so Political parties' Act.*
- 3. The applicants' application and suit are fundamentally flawed and incompetent for want of locus standi.*
- 4. The petition is pre-mature and pre-emptive.*
- 5. The affidavit in support is for striking out for want of form and commission of perjury.*

On these grounds the respondent are seeking for the suit and application to be struck out with costs.

The parties made their oral arguments in court.

The respondents submit that article 162 of the constitution give the court jurisdiction over employment and labour relations. The petitioners are not employees of the respondent as defined by statute as they only enjoyed an allowance. The positions held by the petitioner are under the County government Act and the Petitioners should have gone to the Public Service Commission under the Provisions of section 77 of the County Government Act.

The petitioners cannot come to court before invoking the mandate of the Political Parties Tribunal. As political appointees they derive their rights from the political party and only the Political Parties Tribunal can arbitrate before invoking the court mandate. The petitioners have urged the court inappropriately as they can only file judicial review proceedings following a decision of the respondents. Section 77 of the County Government Act and section 74 of the Public Service Act, the petitioners withdrew their rights to file suit with the courts.

Political parties are left to appoint their representatives under the law and in this case where the mandate is withdrawn they have the right to re-appoint new persons to positions held by the petitioners or go to the political Parties Tribunal.

The respondents also submit that the standing of a party to file suit a representative suit is outlined under the constitution. Hamisi has sworn an affidavit representing other petitioners but there is no consent and thus he has no authority to file suit on behalf of the others. This is fatal to the petition.

The petitioners have relied on the following cases, **County Government of Kisumu & 2 others versus Kisumu County Assembly Service Board & 6 others [2015] eKLR**; **Republic versus Clerk County Assembly of Baringo ex parte William Kassait Kamket [2015] eKLR**; **Peter Lokol Lomulen & 2 Others versus Governor, County Government of Turkana & 3 others [2016] eKLR**; **Republic versus Chairman, Political Parties Disputes Tribunal & 2 others ex parte Susan Kihika Wakarura [2017] eKLR**; **Priscilla Nyokabi Kanyua versus AG & Interim Independent Electoral Commission, Nairobi HCCP No.1 od 2010**; **John Kipng'eno Koech & 2 others versus Nakuru County Assembly & 5 others [2013] eKLR**.

The petitioners submit that the jurisdiction of the court is properly invoked and the Political Parties Act has no relevance herein. Article 162(2) of the constitution give power to the court to hear all employment and labour relations matters which provisions must be read with section 12 of the Employment and Labour Relations Court Act which gives the court original jurisdiction in employment and labour relations matters.

The County Public Service Board where the petitioners serve, pay a salary and allowances and are accountable to the 2nd respondent. a decision of the 2nd respondent on 13th November, 2018 to disband the County Public Service Board which has employed the petitioners and any dispute therefrom is to be filed with the court which has the jurisdiction. This is not a dispute under section 48 of the Political Parties Act or between the 1st and 2nd respondents and a political party so as to go before the Political Parties Tribunal.

Even where the Political Parties Act may apply, the tribunal has no jurisdiction to hear the questions before the court where the County Public Service Act applies. The Court of Appeal in the case of **County Government of Kisumu & 2 others versus Kisumu County Assembly Service Board & 6 others** held that matters relating to the dissolution of a Public County Assembly Board are within the jurisdiction of the court and the petitioners are properly before the court.

The petitioners have moved the court on the basis that the 1st and 2nd petitioners are serving members of the Baringo County Assembly and also members of the Baringo County Assembly Service Board nominated under section 12(3) (c) of the County Government Act whereas the 3rd and 4th are defined as serving members of Baringo County Assembly Service Board nominated under section 12(3) (d) of the County Government Act read with section 46(3) (d) of the County Assembly Service Act.

The petition is that on 13th November, 2018 the respondents caused to be passed a resolution illegally and unprocedurally sought to disband the Baringo County Assembly Service Board without giving proper reasons. Upon the constitution of the 2nd respondent following national elections, the positions under the Baringo County Assembly Service Board were advertised and following which the 1st and 2nd petitioners were nominated by their political party to the County Assembly as members of the Public Service Board, whereas the 3rd and 4th petitioners were shortlisted following the advertisement and then approved by the 2nd respondent. there was publication of the members of the Public Service Board vide gazette notice dated 22nd February, 2018.

At the heart of the matter herein is the decision to dissolve and or disband the Baringo County Assembly Service Board and wherein the petitioners were/are members. In this regard the Court of Appeal has guided that in the case of **County Assembly of Kisumu & 2 others versus Kisumu County Assembly Service Board & 6 Others [2015] eKLR** as follows;

We agree with counsel for the Respondents that County Service Boards do not exist at the pleasure of County Assemblies or any other state organ... they are not subordinate to County Assemblies or any other state organ. County Assemblies have no constitutional or statutory authority to disband, dissolve or even suspend the operations of County Service Boards. ...

Whereas it is not disputed that the petitioners were appointed in their positions properly and such published vide notice dated 22nd February, 2018 their removal from office can only be pursuant to the provisions of Section 58(5) of the GCA which provides that;

The members of the Board may only be removed from office –

- a. On grounds set out for removal of members of a constitutional commission under Article 251(1) of the constitution and*
- b. By a vote of not less than seventy five present of all members of the County Assembly*

the rationale is that, such members of the Public Service Board are appointed upon a competitive process and continue to hold office in accordance with the provisions of section 58(4) of the County Government Act unless removed through the procedures stipulated as above in sub-section (5);

(4) A member of the Board shall—

- (a) hold office for a non-renewable term of six years; and*
- (b) may serve on a part-time basis.*

upon such appointment, there is remuneration and allowances appurtenant thereto for the positions held for the stipulated statutory period. Such provisions which regulates the mandate of the petitioners cannot be removed and separated from the jurisdiction of the court. the court

is mandated under article 162(2) of the Constitution, 2010 to address all matter of employment and labour relations and conferred with jurisdiction under section 12 of the Employment and Labour Relations Court Act, 2011 to hear all matters with regard to employment and labour relations and for connected purposes. In the case of **International Centre for Insect Physiology and Ecology (ICIPE) versus Nancy McNally [2018] eKLR** the Court of Appeal held as follows;

*There cannot be any argument that the ELRC is clothed with jurisdiction to hear and determine such constitutional issues as and when they arise from employment and labour relations. Any doubts on that jurisdiction were settled in the case of **United States International University (USIU) vs Attorney General [2012] eKLR** which was upheld by this Court in **Daniel N. Mugendi vs Kenyatta University & 3 Others [2013] eKLR**. We are not in doubt too, that the relationship between the appellant and the respondent was not a private matter between the two parties but a public activity intrinsically connected to the operations of the appellant.*

The petition herein being premised on the stoppage of the petitioners' term and terms for the positions held and noting the connected purposes, the court is clothed with the requisite jurisdiction.

With regard to the application of the matter in terms of section 77 County Government Act read with section 74 of the Public Service Act, the findings above constant, such do not apply.

Inherently, this then is not a matter for the Political Parties Tribunal. Such mandate is lost noting the provisions of section 58 of the County Government Act noted above, read together with Article 251(1) of the Constitution, 2010.

Article 251(1) of the Constitution provides;

(1) A member of a commission (Other than an ex officio member), or the holder of an independent office, may be removed from office only for –

A serious violation of this constitution or any other law, including a contravention of chapter six; Gross misconduct, whether in the performance of the members or office holder's functions or otherwise; Physical or mental incapacity to perform the function of office; in competence; or bankruptcy.

(2) A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause petition to the National Assembly setting out the alleged facts constituting that ground.

With regard to standing of Maccah Hamisi to file the petition as a representative suit as a representative suit for and on behalf of other petitioners, article 22 of the constitution, 2010 gives the prerequisite conditions thereto.

In the affidavit of Maccah Hamisi in support of the Petition, paragraphs 1 and 2 are in conflict. However attached to the affidavit and petition is the letter of Written Authority executed by 1st, 2nd and 4th petitioners. Such should suffice and enable the court address the substance of the matters in issue.

However, litigation before the court should always abide the Rules applicable, the Employment and Labour Relations Court (Procedure) Rules, 2016 where the application of Rule 7 is imperative;

7. (1) A party who wishes to institute a petition shall do so in accordance with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of the Constitution) Practice and Procedure Rules, 2012.

(2) A person who wishes to institute judicial review proceedings shall do so in accordance with section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules.

(3) Notwithstanding anything contained in this Rule, a party is at liberty to seek the enforcement of any constitutional rights and freedoms or any constitutional provision in a statement of claim or other suit filed before the Court.

Accordingly, the objections raised are found without merit and are hereby dismissed. As the respondents have raised serious questions of law, and which advance the rule of law, no orders to costs.

As the matter relates to Baringo County within the geographical coverage of ELRC Eldoret registry, the file shall be removed to such registry for the court directions therefrom. Interim orders extended to allow for mention on a date to be allocated in court.

Delivered at Nakuru and dated this 24th day of January, 2019.

M. MBARU JUDGE

In the presence of: